SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 25 1965
JOHN F. DAVIS, CLERK

No. 103

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

UNITED DRAPERIES, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Since petitioner filed its petition for certiorari in this case the government has petitioned for certiorari in *Commissioner* v. *Tellier*, No. 351, Oct. Term, 1965.

The question as stated by the Commissioner in its petition in the *Tellier* case is whether certain legal expenses incurred in an unsuccessful defense for violation of the Securities Act and the mail fraud statute "are deductible as ordinary and necessary business expenses under Section 162(a)". The issue in the instant case is whether the payment of kickbacks are deductible as ordinary and necessary business expenses under Section 162(a).

In *Tellier* the Second Circuit said, "yes". In the instant case the Seventh Circuit said, "no".

In respondent's memorandum in opposition, the Commissioner states "that the Seventh Circuit's decision should be permitted to stand regardless of this Court's action in *Commissioner* v. *Tellier*, No. 351, Oct. Term 1965, pending on petition for certiorari because the expenditures here" are against public policy.

We point out that the majority opinion of the Court below stated:

> "In reaching this conclusion we do so apart from consideration of the morality or legality of the practice. Cf. *Heininger* v. *Commissioner*, 320 U.S. 467, 474; *Sullivan* v. *Commissioner*, 7 Cir. 241 F.2d 46; *Commissioner* v. *Doyle*, 7 Cir., 231 F.2d 635."[1]

The dissenting judge in the Court below would allow the deduction in spite of the morality or legality of the practice and would leave it to "Congressional action and not by court edict" to disallow these expenditures.

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[1] In spite of respondent's denial (footnote 3) (after checking with persons who were present) we repeat that during the oral argument before the Court of Appeals counsel for the government stated that the government was abandoning its reliance on the public policy doctrine for the disallowance of these expenditures. If this point is deemed crucial it is requested that the panel of judges of the Seventh Circuit who heard the case below (particularly Judge Hastings in response to whose question counsel stated that the public policy argument was being abandoned) be queried.

Despite the Commissioner's attempt to distinguish this case from *Tellier* on grounds not considered by the Court below (because it was abandoned by the Commissioner), it is submitted that the case of *Tellier* v. *Commissioner*, 2 Cir., ... F.2d ..... is in conflict with this case and, therefore, request for a writ of certiorari should be granted in both cases.

Respectfully submitted,

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END